

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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ELIZABETH FARLEY, Personal Representative  
of the Estate of FRANKLIN FARLEY,

Plaintiff-Appellee,

v

NEVINE M. CARP, JOHN SCHAIRER, D.O.,  
ADVANCED CARDIOVASCULAR HEALTH  
SPECIALISTS, P.C., and MIRCEA R. CARP,  
M.D.,

Defendants,

and

GARDEN CITY HOSPITAL, OSTEOPATHIC,

Defendant-Appellant.

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ELIZABETH FARLEY, Personal Representative  
of the Estate of FRANKLIN FARLEY,

Plaintiff-Appellee,

v

NEVINE M. CARP, M.D., JOHN SCHAIRER,  
D.O., GARDEN CITY HOSPITAL,  
OSTEOPATHIC, and MIRCEA R. CARP, M.D.,

Defendants,

and

ADVANCED CARDIOVASCULAR HEALTH  
SPECIALISTS, P.C.,

Defendant-Appellant.

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FOR PUBLICATION  
January 5, 2010  
9:00 a.m.

Nos. 283405 and 284681  
Wayne Circuit Court  
LC No. 02-237107-NH

No. 283418  
Wayne Circuit Court  
LC No. 02-237107-NH

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KIRT WREN, Personal Representative of the  
Estate of HIRAM DENT,

Plaintiff-Appellee,

v

SOUTHFIELD REHABILITATION COMPANY,  
d/b/a GREAT LAKES REHABILITATION  
HOSPITAL, and MOHAMMED S. SIDDIQUI,  
D.O.,

Defendants,

and

ST. JOHN RIVERVIEW HOSPITAL,

Defendant-Appellant.

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KIRT WREN, Personal Representative of the  
Estate of HIRAM DENT,

Plaintiff-Appellee,

v

SOUTHFIELD REHABILITATION COMPANY,  
d/b/a GREAT LAKES REHABILITATION  
HOSPITAL,

Defendant-Appellant,

and

ST. JOHN RIVERVIEW HOSPITAL and  
MOHAMMED S. SIDDIQUI, D.O.,

Defendants.

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No. 283726  
Wayne Circuit Court  
LC No. 04-425699-NH

No. 283727  
Wayne Circuit Court  
LC No. 04-425699-NH

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LABARON ELLIS and THOMAS J. EDMUNDS,  
Copersonal Representatives of the Estate of  
SAUNDRA L. EDMUNDS,

Plaintiffs-Appellees,

v

HENRY FORD HEALTH SYSTEM, d/b/a  
HENRY FORD HOSPITAL, SACHIN GOEL,  
M.D., JOSEPH LeBEL, D.O., and JOHN  
FERRARA, M.D.,

Defendants-Appellants.

No. 284319  
Wayne Circuit Court  
LC No. 04-426500-NH

Advance Sheets Version

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Before: SAAD, C.J., and SAWYER and BORRELLO, JJ.

SAWYER, J.

This trio of cases provides us with the opportunity to determine the scope of the applicability of this Court's recent decision in *Kidder v Ptacin*,<sup>1</sup> which held that relief from a judgment was not appropriate where the case had been dismissed in accordance with a directive of this Court and the appellate process had been concluded. Although originally submitted as three separate cases, because of the common issue presented in light of *Kidder*, on our own motion we consolidated these cases for purposes of argument and decision. In these appeals, we hold that the *Kidder* principle also applies where the trial court had previously dismissed a case and no appeal had been taken and where the trial court had not yet complied with this Court's earlier directive.

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<sup>1</sup> 284 Mich App 166; 771 NW2d 806 (2009).

Our decision in *Kidder* considered the application of the Supreme Court’s decision in *Mullins v St Joseph Mercy Hosp*<sup>2</sup> to cases that had been previously decided by this Court under *Waltz v Wyse*<sup>3</sup> resulting in summary dispositions in favor of the defendants in certain medical malpractice actions. The Supreme Court’s order in *Mullins* had reversed this Court’s holding that *Waltz* was to be given full retroactive effect. The Supreme Court’s order in *Mullins*<sup>4</sup> held that *Waltz* was not to be applied to any action filed after the decision in *Omelenchuk v City of Warren*<sup>5</sup> in which the saving period had expired within 182 days after the decision in *Waltz*. In *Kidder*, this Court, in a prior unpublished opinion per curiam issued before the Supreme Court’s order in *Mullins*, applied the decision in *Waltz*, concluding that the plaintiff’s suit was not timely, and reversed and remanded the matter to the trial court with instructions to grant summary disposition to the defendants.<sup>6</sup> The trial court complied with this Court’s directions and dismissed the case.<sup>7</sup> Thereafter, the Supreme Court entered its order in *Mullins*. Because the plaintiff in *Kidder* would have prevailed under the *Mullins* holding, the plaintiff in *Kidder* moved for relief from judgment, which the trial court granted and reinstated the plaintiff’s case.<sup>8</sup>

The defendants appealed, arguing that, under the law of the case doctrine, the trial court was obliged to follow this Court’s previous directions to dismiss the case. This Court agreed and again ordered the trial court to grant summary disposition in favor of the defendants.<sup>9</sup>

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<sup>2</sup> 480 Mich 948 (2007).

<sup>3</sup> 469 Mich 642; 677 NW2d 813 (2004).

<sup>4</sup> *Mullins*, *supra* at 948.

<sup>5</sup> 461 Mich 567; 609 NW2d 177 (2000).

<sup>6</sup> *Kidder*, *supra* at 168-169.

<sup>7</sup> *Id.* at 169.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 171.

The three cases before us present a variation on the facts of *Kidder*. In each case, we conclude that *Kidder* either directly controls the outcome of the case or that at least the reasoning in *Kidder* applies and judgment for defendants is appropriate.

Of the three cases, perhaps the easiest to resolve is *Wren* (Docket Nos. 283726 and 283727), because the procedural facts are essentially identical to *Kidder*. In both *Wren* and *Kidder*, this Court issued an opinion before the Supreme Court's order in *Mullins*, which applied *Waltz* retroactively and concluded that the cases were untimely filed.<sup>10</sup> Thus, both cases were concluded at the time the Supreme Court entered its order in *Mullins* and the plaintiffs in both cases sought to have their cases reinstated in light of *Mullins*. In both cases, the trial court ultimately granted relief from judgment in light of *Mullins* and ordered the cases reinstated.<sup>11</sup> Given that *Wren* is in the same procedural posture as *Kidder*, *Kidder* directly controls the outcome of *Wren*. Therefore, we conclude that, in light of *Kidder*, the trial court erred by reinstating plaintiff's cause of action. We vacate the trial court's order in *Wren* reinstating this matter.

The situation in *Ellis* (Docket No. 284319) is somewhat different from *Kidder*, but we nonetheless believe that *Kidder* directs us to the same result. The difference in *Ellis* is that plaintiffs never sought to appeal the trial court's original decision to dismiss the case in light of the retroactive application of *Waltz*. That is, the procedural posture of *Ellis* at the time that the Supreme Court entered its order in *Mullins* was that the trial court had granted defendants'

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<sup>10</sup> There is one distinction between *Wren* and *Kidder* in this regard: in *Kidder*, the trial court had ruled in the plaintiff's favor and the prior appeal was an interlocutory appeal by the defendants seeking to have the case dismissed, while in *Wren* the trial court had dismissed the case and plaintiff appealed to this Court in the prior appeal. But we see no meaningful distinction in this slightly different procedural posture in the prior appeals.

motion and dismissed the case, with plaintiffs not taking an appeal from that decision. The Supreme Court issued its decision in *Mullins* nearly a year later, prompting plaintiffs to file their motion to reinstate the case, which the trial court granted.

Technically speaking, the law of the case doctrine does not apply here because there is not a decision of a higher court that is now binding on the lower court.<sup>12</sup> Despite that fact, however, it is not tenable that plaintiffs in this case should prevail while the plaintiffs in *Wren* and *Ellis* would lose. In *Kidder*,<sup>13</sup> we made the following observation:

MCR 2.612(C)(1)(f) is likewise inapplicable. Just as “equity aids the vigilant, not those who sleep on their rights,” *Falk v State Bar of Michigan*, 411 Mich 63, 113 n 27; 305 NW2d 201 (1981) (RYAN, J., joined by MOODY and FITZGERALD, JJ.) (quotation marks and citations omitted), so does the appellate process. See *Lothian v Detroit*, 414 Mich 160, 175; 324 NW2d 9 (1982) (denying relief to an appellant who, “wholly apprised of the facts which constituted his cause of action, chose to sleep on his rights until a subsequent appellate court decision roused him to action”). The instant defendants were neither parties to *Mullins* nor among those similarly situated parties whose cases were pending in the appellate process. Instead, as earlier indicated, the dismissal of plaintiff’s case had become final (an effective judgment). The interests of justice truly militate against allowing a defeated party’s action to spring back to life because others have availed themselves of the appellate process.

If relief from judgment should not be granted under MCR 2.612(C)(1)(f) where a party sleeps on their appellate rights by failing to seek leave to appeal in the Supreme Court from an adverse ruling in this Court, then certainly relief from judgment is not appropriate where the party never even pursues an appeal from the trial court’s ruling to this Court. To hold otherwise would allow

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<sup>11</sup> Another similarity of both *Kidder* and *Wren* is that in neither case did the plaintiffs seek leave to appeal in the Supreme Court after losing in this Court.

<sup>12</sup> See *Kidder*, *supra* at 170.

<sup>13</sup> *Kidder*, *supra* at 171.

plaintiffs’ “action to spring back to life because others have availed themselves of the appellate process.”<sup>14</sup>

We hold that relief from judgment under MCR 2.612(C)(1)(f) is inappropriate where a party has not sought appellate review of a trial court’s final order and the basis for relief from judgment is a subsequent appellate decision in a different case. Accordingly, the trial court in *Ellis* erred by granting plaintiffs relief from judgment and reinstating their cause of action. We vacate that order and reinstate the trial court’s original order dismissing the case with prejudice.

We finally turn to *Farley* (Docket Nos. 283405, 284681, and 283418), which presents the most distinct set of facts of this trio of cases. In *Farley*, there are two significant procedural differences from *Kidder* and *Wren*. First, in *Farley*, plaintiff did not sit on her appellate rights. After the adverse decision in this Court, she sought leave to appeal in the Supreme Court, which denied leave.<sup>15</sup> Second, the trial court never complied with this Court’s directions on remand. That is, in our prior opinion, we directed the trial court to enter an order granting defendants summary disposition.<sup>16</sup> The trial court never complied with that directive. Thus, the trial court never granted plaintiff relief from judgment after the Supreme Court’s decision in *Mullins* because there was no trial court judgment to grant relief from.

We do not believe that either of these distinctions, however, requires a different result. The fact that the Supreme Court denied leave to appeal means that our earlier decision is now the final adjudication in this case and may be enforced according to its terms.<sup>17</sup> Furthermore, we

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<sup>14</sup> *Kidder, supra* at 171.

<sup>15</sup> *Farley v Advanced Cardiovascular Health Specialists, PC*, 474 Mich 1020 (2006).

<sup>16</sup> *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 568-570; 703 NW2d 115 (2005).

<sup>17</sup> *Detroit v Gen Motors Corp*, 233 Mich App 132, 140; 592 NW2d 732 (1998).

cannot endorse a process by which relief can be obtained because the lower court chose to simply ignore the clear directive of the appellate court, allowing the case to languish until there is a change in law to justify the result that the lower court would like to apply.<sup>18</sup>

Simply put, the trial court had no alternative in this case other than to comply with the direction of this Court in our previous opinion. And once the trial court so complies, as discussed above, it is precluded from granting relief from judgment under the law of the case doctrine.

The orders of the trial courts in these cases reinstating these cases are vacated. The matters are remanded to the respective trial courts with direction to enter orders of summary disposition in favor of defendants. We do not retain jurisdiction. Costs to defendants.

SAAD, C.J., concurred.

/s/ David H. Sawyer  
/s/ Henry William Saad

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<sup>18</sup> See *Cox v Flint Bd of Hosp Managers (On Remand)*, 243 Mich App 72, 93; 620 NW2d 859 (2000), and *Sumner v Gen Motors Corp (On Remand)*, 245 Mich App 653; 633 NW2d 1 (2001) (discussing the need for finality in this Court's judgments).